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Supreme Court, U.S.
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No._____

IN THE
SUPREME COURT OF THE UNITED STATES

MICHAEL D. PORTER,
Petitioner,
vs.

BOB WHITE, SHERIFF OF PASCO COUNTY, FLORIDA
and JAMES GARY FAIRBANKS,
Respondents.

On Petition for Writ of Certiorari to The United States Court of Appeals
For the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI
PAGES 1 through 40

BARRY A. COHEN
KEVIN J. DARKEN
COHEN, JAYSON & FOSTER, P.A.
201 E. Kennedy Blvd., Suite 1000
Tampa, Florida 33602
(813) 225-1655 Fax (813) 225-1655
Attorneys for Petitioner, Michael D. Porter

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KEVIN J. DARKEN
COHEN, JAYSON & FOSTER, P.A.
201 E. Kennedy Blvd., Suite 1000
Tampa, Florida 33602
(813) 225-1655 Fax (813) 225-1655
Attorneys for Petitioner, Michael D. Porter

QUESTIONS PRESENTED FOR REVIEW

1. Did the court of appeals err by holding that a police officer cannot be liable under 42 U.S.C. § 1983 for violating a criminal defendant's constitutional right to a fair trial by failing to provide exculpatory evidence to a prosecutor unless the police officer was more than negligent based on its misinterpretation of this Court's opinions in *Daniels v. Williams*, 474 U.S. 327 (1986), and *Davidson v. Cannon*, 474 U.S. 344 (1986)?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The Petitioner in this case is Michael D. Porter. The Respondents in this case are Bob White, in his official capacity as Sheriff of Pasco County, Florida, and James Gary Fairbanks, a retired detective of the Pasco County Sheriff's Office ("PCSO").

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I. The court of appeals erred by holding that police officers are not liable under 42 U.S.C. § 1983 for violating a criminal defendant's constitutional right to exculpatory evidence necessary for a fair trial without proof of more than negligent conduct because the court of appeals misinterpreted this Court's opinions in *Daniels v. Williams* and *Davidson v. Cannon.*

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PETITION FOR WRIT OF CERTIORARI

Michael D. Porter respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit rendered and entered in *Michael D. Porter v. Bob White, Sheriff of Pasco County and James Gary Fairbanks,* case no. 06-11769, 483 F.3d 1294, in that court on April 12, 2007, which affirmed the summary judgment order of the United States District Court for the Middle District of Florida.

OPINIONS AND JUDGMENTS IN THE COURTS BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit which affirmed the summary judgment of the United

States District Court for the Middle District of Florida, published at 483 F.3d 1294, is contained in the Appendix (App.1). Also included in the appendix are the Court of Appeals order denying Porter's Petition for Rehearing and Rehearing En Banc dated July 18, 2007; (App.69); the Court of Appeals mandate dated July 26, 2007 (App.71); the district court's summary judgment order dated March 10, 2006 (App.72); and the Court of Appeals' 2002 opinion holding that Porter's constitutional right to a fair trial was violated. (App.96).

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. This

petition was timely filed pursuant to Sup.Ct.R.13.3, within 90 days of the Court of Appeal's denial of the petition for rehearing on July 18, 2007.

BASIS FOR FEDERAL JURISDICTION IN THE DISTRICT COURT

The basis for federal jurisdiction in the district court was federal question jurisdiction under 28 U.S.C. § 1331.

STATUTORY AND OTHER PROVISIONS INVOLVED

Petitioner intends to rely upon the following constitutional provisions, treaties, statutes, rules, ordinances and regulations:

U.S. Const. Amend. XIV, Section 1(abridged):

No State shall make or enforce any laws, which shall abridge the privileges or immunities

of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amend. VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and

to have the Assistance of the Counsel for his defense.

42 U.S.C. § 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted

unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

A. Statement of The Facts

Between approximately 11:30 p.m. on June 26, 1987, and approximately 12:30 a.m. on June 27, 1987, a woman was raped in her unit at the LaRue Motel on U.S. Highway 19 in Holiday, Florida. PCSO Deputy William Karcinski was the first law enforcement officer to respond. Karcinski interviewed the victim at a Shell gas station where she had gone for help and obtained a description of the rapist from the victim. Later

that shift, Karcinski completed a report of his involvement in this case and recorded the victim's description of the rapist as 38-40 years old, 5'7" to 5'9" tall, and 150 pounds. Ex. 1 to D.E. 48.

PCSO Deputies Hendrickson and Nicholas arrived at the LaRue Motel. While securing the crime scene, Hendrickson observed a Marlboro cigarette on the kitchen floor of the victim's apartment. Later Hendrickson interviewed three individuals during a neighborhood check, including a man named Tony Hawkins who arrived at the LaRue at 1:30 a.m. to talk to a friend who was staying there. Hendrickson noted that Hawkins was smoking a Marlboro cigarette. In his report, Hendrickson described Hawkins as 5'9" tall and 160 pounds and recorded Hawkins'

birthday as October 9, 1944, which made Hawkins 42 years old. Ex. 2 to D.E. 48.

When Defendant Fairbanks arrested Plaintiff Michael Porter in September 1987 for this rape, Fairbanks recorded Porter's height as 6'1" and his weight as 170 pounds. Michael Porter was only 27 years old in June 1987. Ex. 3 to D.E. 48.

On August 16, 1988, Michael Porter was tried and convicted in Pasco County Circuit Court of multiple counts of sexual battery. Complaint, ¶ 2. In October 17, 1988, Porter was sentenced to serve the rest of his life in prison without the possibility of parole. *Id.*

As the lead detective in this case, Defendant Fairbanks was responsible under existing PCSO policy to ensure that all PCSO reports were delivered to the State Attorney's Office. Exs. 4 and 5 to D.E. 48. Detective Fairbanks admits he had both the Hendrickson and Karcinski reports before Porter's 1998 trial. Ex. 13 to D.E. 48. When deposed in 1996, long before he became a defendant in this case, Fairbanks testified "I have no idea" whether or not the Henderson and Karcinski reports were ever furnished to the State Attorney's Office before Porter's trial in 1988. Ex. 13 to D.E. 48.

Declan Mansfield was the Assistant State Attorney who prosecuted Michael Porter at his

1988 trial. Mansfield testified that he turned over all police reports to Porter's defense attorneys and that any PCSO reports not disclosed to the defense must not have been turned over to him. Ex. 10 to D.E. 48.

Detective Fairbanks did not remember prosecutor Mansfield having the Karcinski report during his "invest" [1] meeting with Mansfield and did not remember seeing either the Karcinski report or the Hendrickson report in Mansfield's file. Ex. 5 to D.E. 48.

When Assistant State Attorney Scott

[1] As the Court of Appeals described it, "[a]n 'invest' is a meeting between the law enforcement officers handling an investigation and the prosecutor, at which time a decision is made regarding whether the State will file charges against the subject of the investigation." *Porter v. White*, 483 F.3d 1294, 1300 (11th Cir. 2007) (App. 20).

Andringa was investigating how to respond to Porter's 3.850 motion for post-conviction relief in 1996, which raised the non-disclosure of *Brady* material issue, Andringa reviewed the State Attorney's Office case file and found no evidence that the State Attorney's Office had turned over the Hendrickson and Karcinski reports to Porter's defense counsel, which Mansfield had testified he would have done if he had received those reports. Ex. 11 to D.E. 48.

Michael Porter originally was represented by Assistant Public Defender Michael McMillan. McMillan saw no PCSO reports describing an alternative suspect and never heard the name of Tony Hawkins during the time he represented Michael Porter. Exs. 6 and 7 to D.E. 48. When

McMillan deposed Deputy Karcinski he asked Karcinski no questions about the description the victim gave to Karcinski and which Karcinski recorded in his report. Ex. 8 to D.E. 48. McMillan also excused Deputy Hendrickson from his pretrial deposition based on Hendrickson's representation that he talked to two neighbors at the crime scene who both "indicated that they had not heard anything and had no knowledge of the facts of the burglary and sexual assault that occurred inside the victim's house." *Id.*

Assistant Public Defender Steven Dehnhart replaced McMillan as Michael Porter's trial counsel approximately a month before the trial in August 1988 when McMillan contracted a

near-fatal infection. Dehnhart did not see the Karcinski report prior to the trial and did not have the Hendrickson report prior to the trial. Dehnhart never used the Karcinski report to cross-examine the victim regarding discrepancies between her description of the rapist and Michael Porter's actual appearance, and never used the Hendrickson report to develop an alternative suspect defense. In fact, Dehnhart never referred to Tony Hawkins at all during the entire trial and never even called Hendrickson as a witness at the trial. Ex. 9 to D.E. 48.

On February 4, 2002, the Court of Appeals reversed Michael Porter's convictions on the grounds that the Hendrickson and Karcinski reports constituted material exculpatory evidence

which the Due Process Clause required be turned over to Porter's defense counsel. App. 103. The Court of Appeals found that Porter had "shown a reasonable probability that the result of the trial would have been different if the police reports had been produced and available" because those reports "would have been available as the basis for cross-examination of the victim whose identification Porter says was inconsistent" and would have led to "inquiry into the circumstances of the presence at the [crime] scene of [Tony] Hawkins who Porter says matched the description of the perpetrator in the report." *Id.*

The Court of Appeals concluded: "Withholding of *Brady* material in a trial that carries a life sentence is highly disturbing

especially when it relates to the reliability of the only eye-witness who identified the defendant. Our government can do better than this." App. 103 - 104.

As a result of the Court of Appeals' decision, Michael Porter received a new trial at which his defense counsel was able to use the previously undisclosed Hendrickson and Karcinski reports. On November 16, 2002, Porter was found not guilty of all charges at his retrial by a jury, which was able to hear about the evidence suppressed by the Pasco County Sheriff's Office in 1988.

B. Course of Proceedings and Disposition in the District Court

Plaintiff Michael Porter sued Defendant James Gary Fairbanks, a retired PCSO detective,

and Defendant Bob White, Sheriff of Pasco County, Florida, for violating Porter's constitutional rights under *Brady v. Maryland,* 373 U.S. 83 (1963) to the exculpatory information necessary for a fair trial and thereby causing Porter to be wrongly imprisoned between 1988 and 2002.

Plaintiff sued Defendant Fairbanks in Count I under 42 U.S.C. § 1983 for suppressing the exculpatory Hendrickson and Karcinski police reports in 1987-88 by failing to provide those reports to the State Attorney's Office, which in turn could not provide them to Porter's defense counsel. Plaintiff also sued Defendant White in his official capacity in Count II for the Pasco County Sheriff's Office's custom of failing to

provide exculpatory police reports to the State Attorney's Office, and in Count III for the Sheriff's Office policy or custom of failing to train its deputies in their constitutional obligation to provide exculpatory police reports to the State Attorney's Office.

The district court granted summary judgment to Defendant Fairbanks on Count I on the grounds that Detective Fairbanks was shielded by qualified immunity. Docket Entry ("D.E.") 59 at 9. The district court reasoned that "[i]n order for Defendant Fairbanks to have violated clearly established law in 1988 so as to remove the cloak of qualified immunity, the admissible evidence in this case must establish that Defendant Fairbanks intentionally withheld

the police reports from the prosecution." *Id.* at 8. After finding that "[n]o witness in this case can prove definitively what happened to the reports in 1988", the court ruled that "there is no evidence that Defendant Fairbanks intentionally withheld the subject reports from the prosecution." *Id.*at 9. Accordingly, the district court granted Defendant Fairbanks' motion for summary judgment on qualified immunity grounds. *Id.*

The district court granted summary judgment to Defendant White on Count II on the grounds "that there is insufficient evidence to show that any policy of the Pasco County Sheriff's Office caused the *Brady* violation" which resulted in Michael Porter receiving an unconstitutional trial in 1988 and spending 15 years in prison

before receiving a fair trial, and being acquitted, in 2002. D.E 59 at 11. Similarly, the district court granted summary judgment to Defendant White on Count III on the basis of insufficient evidence. *Id.* at 11-12.

C. Course of Proceedings in the Court of Appeals

The Court of Appeals affirmed the district court's summary judgment order for two reasons.

First, based on its interpretation of this Court's decisions in *Daniels v. Williams*, 474 U.S. 327 (1986) and *Davidson v. Cannon*, 474 U.S. 344 (1986), the Eleventh Circuit held that "a negligent act or omission cannot provide a basis for liability in a § 1983 action seeking compensation for loss of liberty occasioned by a *Brady* violation" because

"mere negligence or inadvertence on the part of a law enforcement official in failing to turn over *Brady* material to the prosecution, which in turn causes a defendant to be convicted at a trial that does not meet the fairness requirements imposed by the Due Process Clause, does not amount to a 'deprivation' in the constitutional sense." *Porter v. White*, 483 F.3d 1294, 1308 (11th Cir. 2007). (App.53-54).

Second, the Court of Appeals held that since "there is no evidence of ill-will or motive on the part of Fairbanks", summary judgment was appropriate because Porter had failed to create a genuine issue of material fact as to whether either the Karcinski report or the Hendrickson report had failed to reach the State Attorney's Office "as

a consequence of some more-than-negligent act or omission on the part of Fairbanks ...." *Id.* at 1311. (App.66-67).

REASONS FOR GRANTING THE WRIT

The Court of Appeals erred, as the Fourth Circuit also did in *Jean v. Collins*, 221 F.3d 656 (4th Cir. 2000), by rotely applying language from garden variety prisoner tort cases like *Daniels v. Williams* (prison slip and fall) and *Davidson v. Cannon* (failure to adequately protect a prisoner from another inmate) to hold that a negligent deprivation of a criminal defendant's *Brady* rights to the material exculpatory evidence necessary for a fair trial does not constitute a "deprivation" of a constitutional right compensable under Section

1983.[2] But the right to a fair trial [3] is so important, both to actually innocent defendants and to the public perception of the American criminal justice system, that even a negligent deprivation of this right by police officers should subject them to liability under Section 1983.

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[2] In *Villasana v. Wilhoit*, 368 F.3d 976, 980 (8th Cir. 2004), the Eighth Circuit relied on *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988) to similarly hold that "the recovery of § 1983 damages requires proof that a law enforcement officer other than the prosecutor intended to deprive the defendant of a fair trial."

[3] The *Brady* right to material exculpatory evidence is grounded in the Constitution's "basic 'fair trial' guarantee". *United States v. Ruiz*, 536 U.S. 622, 628 (2002), which is expressed in both the Sixth Amendment, *Id.*, and in the Due Process Clause of the Fifth Amendment and the Fourteenth Amendment. *United States v. Agurs*, 427 U.S. 97, 107 (1976).

In *Daniels*, this Court held that summary judgment was properly granted against a state prisoner's claim under § 1983 for injuries sustained when he slipped on a pillow negligently left on a prison stairway by a guard. Speaking beyond the facts of that case, the *Daniels* Court stated that mere lack of due care by a state official does not "deprive" an individual of life, liberty, or property under the Fourteenth Amendment. Relying on *Daniels*, this Court then decided on the same day in *Davidson* that prison officials' failure to use due care to protect an inmate from assault by another inmate also did not constitute "deprivation" of a protected interest under the Fourteenth Amendment.

This Court had four reasons for concluding in *Daniels* and *Davidson* that "the protections of the Due Process Clause, whether procedural or substantive, are just not triggered by lack of due care ...." *Davidson,* 474 U.S. at 348. First, this Court noted that historically the Due Process Clause had "been applied to deliberate decisions of government officials to deprive a person of life, liberty, or property." *Daniels,* 474 U.S. at 331. Second, the Court observed that the Due Process Clause "was 'intended to secure the individual from the arbitrary exercise of the powers of government'". *Id., quoting Hurtado v. California,* 110 U.S. 516 (1884). The Court found that "the actions of prison custodians in leaving a pillow on

the prison stairs, or mislaying an inmate's property" were "[f]ar from an abuse of power ...." *Id.*

Third, the Court stated that "[o]ur Constitution deals with the large concerns of the governors and the governed, but it does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society." *Id.* at 332. Fourth, the Court observed that "[t]he only tie between the facts of this case and anything governmental in nature is the fact that respondent was a sheriff's deputy at the Richmond city jail and petitioner was an inmate confined in that jail." *Id.*

In evaluating the Court of Appeals' decision to automatically apply *Daniels* and *Davidson* to this case, it is important to keep in mind that this Court has held "that 'the elements and prerequisites for recovery of damages' [under Section 1983] might vary depending on the interests protected by the constitutional right at issue." *Memphis Community School District v. Stachura*, 477 U.S. 299, 309 (1986), *quoting Carey v. Piphus*, 435 U.S. 247, 264-65 (1978). As the Court noted in *Daniels*, "depending on the [constitutional] right, merely negligent conduct may not be enough to state a claim" under Section 1983. 474 U.S. at 330. By the same token, however, merely negligent conduct should be enough to state a § 1983 claim when the

constitutional right at stake is as important as the right to a fair trial.

The Court of Appeals erred by not analyzing the penultimate interest in the fairness of criminal trials at stake in this case against the four grounds articulated in *Daniels*. This Court should now grant certiorari to do this analysis itself.

The Court of Appeals erred in the first instance by ignoring the fact that this Court has historically applied the fair trial guarantee of the Due Process Clause and the Sixth Amendment to prohibit actions of law enforcement officials and judges which were not deliberate decisions to intentionally and wrongfully deprive a criminal defendant of his or her liberty. For example, in

Medina v. California, 505 U.S. 437 (1992), this Court held "that a State's 'failure to observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial deprives him of his due process right to a fair trial." 505 U.S. 437, 450 (1992), *quoting Drope v. Missouri, 420 U.S.* 162, 172-73 (1975). Similarly, in *Crane v. Kentucky,* 476 U.S. 683, 690 (1986), the Court held that a state court's "blanket exclusion of the proffered testimony about the circumstances of petitioner's confession deprived him of a fair trial."

Likewise, in *Connecticut v. Johnson,* 460 U.S. 73, 88 (1983), this Court held that a trial court deprived a criminal defendant of his fair trial rights by erroneously instructing the jury

that every person is conclusively presumed to intend the natural and necessary consequences of his acts. In *Chambers v. Mississippi*, 410 U.S. 284, 303 (1973), the Court held that the trial court's exclusion of critical evidence based on the hearsay rule deprived the defendant of a fair trial. Moreover, the Court in *Sheppard v. Maxwell*, 384 U.S. 333 (1966) and *Estes v. State of Texas*, 381 U.S. 532 (1965), held that criminal defendants were deprived of their rights to a fair trial due to the failure of trial judges to protect the defendants from highly prejudicial publicity.

None of these cases involved deliberate efforts by law enforcement officials or judges to deprive criminal defendants of their constitutional right to a fair trial. Yet in each

case, this Court held that the defendant's right to a fair trial had been deprived despite the lack of any intent to do so.

Second, the Court of Appeals erred by ignoring the fact that this Court has made clear since *Daniels* and *Davidson* that Section 1983 does not require "proof of an abuse of governmental power separate and apart from the proof of a constitutional violation." *Collins v. City of Harker Heights, Texas*, 503 U.S. 115, 120 (1992).[4] But even if proof of an abuse of governmental power was required to establish liability under Section 1983, a police officer's

[4] In this case, of course, the underlying constitutional violation of failing to produce exculpatory evidence requires no proof of bad faith or bad intent. *Brady v. State of Maryland*, 373 U.S. 83, 87 (1963); *Giglio v. United States*, 405 U.S. 150, 154 (1972).

negligent failure to produce exculpatory evidence is indeed an abuse of governmental power. Police officers are required by the Constitution to provide exculpatory evidence to prosecutors and their negligent failure to do so causes unfair trials at which innocent defendants are convicted. By barring unfair criminal trials in which material exculpatory evidence was withheld from defense counsel, whether negligently or intentionally, the fair trial guarantee of Due Process Clause and the Sixth Amendment "serves to prevent governmental power from being 'used for purposes of oppression,'" such as convicting and imprisoning innocent defendants like Michael Porter. *Daniels,* 474 U.S. at 331.

Third, the Court of Appeals erred by failing

to consider the fact that the failure of police officers to provide exculpatory evidence to prosecutors for production to defense counsel obviously does concern the relationship between the government and the governed, unlike the garden variety torts in *Daniels* and *Davidson*. Without exculpatory evidence, defendants and their lawyers cannot hold the government to its burden of proof. Ensuring that exculpatory evidence is produced by police officers to prosecutors in turn ensures that government's power to imprison its citizens is limited to only those defendants convicted after a fair trial.

Fourth, the Court of Appeals erred by failing to consider that the tie between the facts of this case and "anything governmental in nature"

is much more than merely the location of where a common law tort occurred, as in *Daniels* and *Davidson*. In fact, the constitutional violation at issue here can *only* be committed by government officials who are either prosecutors or police officers.

CONCLUSION

The Court should grant certiorari in order to make clear that despite *Daniels* and *Davidson*, the right to a fair trial is so important that police officers may be sued under Section 1983 for even negligent violations of criminal defendants' constitutional right to material exculpatory evidence. Unlike prosecutors, police officers are not subject to bar disciplinary actions for *Brady* violations. The threat of potential liability under Section 1983 is essential to ensure that police

officers comply with their constitutional obligation to turn over material exculpatory evidence to prosecutors so that criminal defendants thereby receive the fair trial guaranteed them by the Constitution.

The facts of this case demonstrate why police officers need to be held liable under Section 1983 for even negligent violations of defendants' *Brady* right to material exculpatory evidence in order to deter such violations. In August 1988, Michael Porter went to trial in Pasco County without the exculpatory Hendrickson and Karcinski PCSO reports. Nine months earlier, in November 1987, United States District Judge George Carr reversed the first degree murder convictions and associated death sentences of

William Riley Jent and Earnest Lee Miller in Pasco County based on his finding that a PCSO report indicating that the murder could not have occurred when the prosecution contended it did constituted undisclosed material exculpatory evidence. Ex. 1 to D.E. 49. Judge Robert Cole, one of two prosecutors who tried the Jent case and the Miller case, testified in this case that neither he nor the other prosecutor were furnished this exculpatory report. Ex. 5 to D.E. 49. Moreoever, the PCSO detective who wrote the exculpatory report denied discussing the substance of his report with the prosecutors. Ex. 4 to D.E. 49. Judge Carr concluded that the detective's failure to mention his undisclosed report in his pretrial deposition was intentional.

Ex. 1 to D.E. 49.

In January 1988, eight months before Michael Porter was tried, Jent and Miller reached plea agreements under which they pled guilty to second degree murder in exchange for time served sentences. Ex. 7 to D.E. 49. In an editorial titled "A Bizarre Conclusion to a Grisly Murder Case", the *Tampa Tribune* criticized the Pasco County Sheriff's Office by noting that the Jent and Miller convictions and death sentences were reversed "when it was found that the Pasco detectives investigating the case eight years ago withheld evidence that might have helped Miller and Jent avoid the death penalty, might even have helped them avoid conviction altogether." *Id.* The *St. Petersburg Times* also reported that evidence

indicating Jent and Miller "may not have committed the murder" "had been withheld by the Pasco County Sheriff's Office ...." Ex. 8 to D.E. 49.

Despite the high profile nature of the Jent and Miller cases and the public criticism by the two largest metropolitan newspapers, Pasco County Sheriff Jim Gillum took no remedial actions following the reversal of the Jent and Miller convictions and death sentences. No investigation was conducted to determine how and why the exculpatory report was not turned over and no PCSO deputies or detectives were disciplined. Exs. 5 and 9 to D.E. 49. Moreover, the Pasco County Sheriff's Office did not even make any changes to its policies or procedures regarding how reports were supposed to be

processed and sent to the State Attorney's Office, Ex. 10 to D.E. 49, and conducted no training regarding its deputies' constitutional obligation to provide exculpatory reports to the State Attorney's Office. Exs. 5 and 9 to D.E. 49.

The utter failure of the Pasco County Sheriff's Office to take any corrective action following the reversal of the Jent and Miller convictions illustrates why police officers need to be held liable under Section 1983 for even negligent violations of defendants' *Brady* right to material exculpatory evidence. There is simply no effective internal disciplinary mechanism to compel police officers to perform their constitutional obligation of providing material

exculpatory evidence to prosecutors. Only the threat of personal civil liability under Section 1983 for even negligent violations will ensure that police officers turn over the material exculpatory evidence required for the fair trials guaranteed to criminal defendants by the Constitution.

Respectfully submitted,

BARRY A. COHEN
KEVIN J. DARKEN
COHEN, JAYSON & FOSTER, P.A.
201 E. Kennedy Blvd.
Suite 1000
Tampa, Florida 33602
(813) 225-1655 Fax (813) 225-1655
Attorneys for Petitioner, Michael D. Porter

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CERTIFICATE OF SERVICE

I CERTIFY that on December 17, 2007, a true copy of the Petition for Writ of Certiorari and Appendix has been served by U.S. Mail, postage prepaid upon D. Andrew Debevoise, Esq., Debevoise & Poulton, P.A., 1035 S. Semoran Blvd.,Winter Park, Florida 32792, *Attorney for Defendant Bob White, Sheriff of Pasco County, Florida* and John W. Jolly, Esq.,Jolly, Peterson & Cherr, P.A., P.O. Box 37400, Tallahassee, Florida 32315-7400, *Attorney for Defendant James Gary Fairbanks.*

Kevin J. Darken, Esq.
Attorney for Petitioner

APPENDIX

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Attorneys for Petitioner, Michael D. Porter

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SUPREME COURT OF THE UNITED STATES

MICHAEL D. PORTER,
Petitioner,
vs.

BOB WHITE, SHERIFF OF PASCO COUNTY, FLORIDA
and JAMES GARY FAIRBANKS,
Respondents.

On Petition for Writ of Certiorari to The United States Court of Appeals For the Eleventh Circuit

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THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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No. 06-11769

D.C. Docket No. 04-00367 –T-17-MSS

MICHAEL D. PORTER,

Plaintiff -Appellant,

Versus

BOB WHITE,
In his official capacity as Sheriff of Pasco County,
JAMES GARY FAIRBANKS

Defendants-Appelles.

Appeal from the United States District Court for the Middle District of Florida

(April 12, 2007)

Before ANDERSON and MARCUS, Circuit Judges, and ALTONAGA,* District Judge.

ANDERSON, Circuit Judge:

* Honorable Cecilia M. Altonaga, United States District Judge for the Southern District of Florida, sitting by designation.

In 1988, Michael D. Porter was convicted of burglary, kidnapping, robbery, aggravated battery, and sexual battery in Pasco County, Florida. He was sentenced to life in prison without the possibility of parole. In 2002, we granted Porter's petition for habeas corpus and set aside his conviction after concluding that the prosecution had violated his due process rights under Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194 (1963), by failing to disclose to him, for use at trial, two favorable police reports, both of which were material to his defense. Porter v. Moore, No. 01-12311 (11th Cir. Feb. 4, 2002) (unpublished). Later in 2002, this time equipped with the previously undisclosed reports, Porter was retried and acquitted of all charges.

In 2004, Porter filed this § 1983 damages

action against James G. Fairbanks, the former Pasco County investigator who he alleges withheld from the State Attorney's Office the undisclosed police reports, thereby depriving Porter of his Fourteenth Amendment due process right to a fair trial.[1] In addition to his individual-capacity claim against Fairbanks,[2] Porter alleges two official-

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[1] Although Porter's complaint erroneously invokes the Due Process Clause of the Fifth Amendment, we will refer throughout this opinion to the Due Process Clause of the Fourteenth Amendment, because Porter was prosecuted in state court and because his claims in this suit are against a non-federal government official and a non-federal governmental entity.

[2] Porter also originally sued Fairbanks in his official capacity. The parties stipulated to the dismissal of the official-capacity claim in the district court.

capacity claims against Bob White, the former Pasco County Sheriff. The claims against White assert that the county is liable in damages under § 1983 for inadequately training Fairbanks and other sheriffs department employees in the proper methods of disclosing Brady material, and that the county is similarly liable for maintaining a custom or policy of not disclosing Brady material, which caused Fairbanks to violate Porter's due process rights. motions for summary judgment. Fairbanks and White moved separately for summary judgment as to all claims. Porter moved for summary judgment only on his claim against Fairbanks. Denying Porter's motion and granting summary judgment in favor of Fairbanks and White, the district court concluded that Fairbanks was entitled to qualified immunity on Porter's due

process claim (because Fairbanks did not violate a "clearly established" right) and that Porter had failed to create a genuine issue of material fact on his claims against White. Porter appeals. Concluding that Porter's due process claim fails on the merits, we affirm.

I. BACKGROUND

Just before midnight on June 26, 1987, Morton Young was brutally attacked and raped in her room at the LaRue Motel in Holiday, Florida. Following the attack, Young made her way to a nearby gas station to seek help. William Karcinski and Sandy Nicholas were dispatched to the gas station in response to a call from the station attendant - at the time, Karcinski was a recently hired deputy sheriff with the Pasco County Sheriffs Office, and Nicholas was his field training officer.

Karcinski and Nicholas were the first law enforcement officials to respond. According to Karcinski, Young was "crying, nervous, [and] upset." Karcinski interviewed Young at the gas station. He asked her if she could provide a description of her attacker and if she could recount the manner in which she had been attacked. She did both. Karcinski recorded Young's statements in a written incident report.

Karcinski's report reveals that Young was watching television in her bedroom around 11:30 p.m. when she heard a noise coming from the kitchen/living room area. She got up to investigate and was confronted by a man who wrapped a belt around her neck and spun her around so she could not see his face. Telling her to keep quiet, the man laid Young down on her stomach and said, "I bet

you didn't know I was going to do this. I've been watching you." The man tightened the belt around Young's neck, dragged her from room to room throughout the unit, and tried repeatedly to have sex with her. After several failed attempts to obtain an erection, the man finally succeeded and proceeded to rape Young while she was submerged in a bathtub half filled with water. When he was finished, the man told Young to lie face down on the couch because he was "going to take her money and leave." Young stayed on the couch for approximately half an hour before going to the gas station for help.

Despite her view having been partially obscured during the attack, Young was able to give Karcinski the following description of her attacker, which Karcinski recorded in his report - Race:

White. Age: 38-40. Height: 5'7"-5'9". Weight: 150 lbs. Hair: Dark. Eyes: Unknown. Build: Thin. Young told Karcinski that her attacker had been wearing blue jeans and an unknown type shirt. Rather than going to the LaRue Motel to view the scene of the attack, Karcinski and Nicholas accompanied Young to the local hospital. At the hospital, they met the lead investigator assigned to the case, James G. Fairbanks. Fairbanks also worked for the Pasco County Sheriff's Office. Karcinski proceeded to tell Fairbanks all of the information he had learned from Young. Karcinski says he informed Fairbanks of Young's description of the attacker during their initial conversation. Karcinski did not provide Fairbanks a copy of his written report at the hospital, however, because it was not yet complete and because it had not been

approved by Karcinski's supervisor. Fairbanks does not remember Karcinski giving him a description of Young's attacker at the hospital. Fairbanks says he first learned of the description Young gave Karcinski when he received Karcinski's report on June 28.

After speaking to Karcinski and Nicholas, Fairbanks interviewed Young while still at the hospital. Young recounted the details of the attack. She told Fairbanks that she could not provide a description of her attacker's face, but she was able to give him a general physical description. According to Fairbanks, Young stated that her attacker was a white male, 6'1" in height, weighed 150 lbs., had dark wavy hair, and appeared to be in his late 30s. Fairbanks recorded Young's statements in a written report dated July 7, 1987.

Following their meeting with Fairbanks at the hospital, Karcinski and Nicholas were sent to the LaRue Motel to monitor the scene of the crime. There, they encountered Pasco County deputy sheriff Thomas Hendrickson, who had been dispatched to the motel shortly after the attack was reported. While securing the scene upon his arrival at the motel, Hendrickson observed a Marlboro cigarette lying on the floor of the kitchen in the unit where Young had been attacked. He later conducted a sweep of the area surrounding the crime scene and spoke to a handful of individuals. One of the individuals with whom Hendrickson spoke was Tony Hawkins. Hawkins, whom Hendrickson observed smoking a Marlboro cigarette, told Hendrickson that he had come to the motel at approximately 1:30 a.m. to visit his friend

Robert George, who lived there. Hawkins and George were sitting at an outdoor table having a beer when Hendrickson encountered them. Hendrickson also spoke to George. Neither Hawkins nor George was able to relate any information Hendrickson considered particularly useful to the investigation.

Hendrickson summarized in a written report his conversations with George, Hawkins, and two other individuals present at the motel. Included in Hendrickson's report was the following description of Hawkins: Born in 1944; 5'9" in height; 160 lbs.; brown hair; blue eyes.

Hendrickson also recorded the fact that Hawkins smoked Marlboro cigarettes. At the time he spoke with these four individuals, Hendrickson was aware of the description Young had given

Karcinski at the gas station. Hendrickson recognized that, while similar, the description of Hawkins and the description of the attacker Young had provided Karcinski were not identical. The descriptions were not similar enough to make Hendrickson suspect that Hawkins was the attacker. Had his suspicions been raised, Hendrickson says, he "would have immediately contacted the case detective and made sure he stuck around." According to the sheriff department policy in place at the time, Hendrickson would have been required to complete his report and place it in a box for his sergeant's approval by the end of his shift. From there, the report would have been forwarded to the lead detective on the case, Fairbanks.

Fairbanks received Hendrickson's report on

June 28, the same day he received Karcinski's. Fairbanks had an opportunity at this point to gauge the similarities and differences between the two descriptions Young gave of her attacker and the description of Hawkins recorded by Hendrickson. Fairbanks conducted a follow up interview with Young three or four days after the attack. During this interview, Young and the manager of the LaRue Motel gave Fairbanks the name of Michael Porter as someone who should be investigated. Porter's name surfaced after the motel manager had reviewed the guest records and determined that Porter and his wife, Susan, who were going through a bitter separation, had stayed at the motel shortly before the attack. Given the confirmation of his presence at the motel just days before June 26, Porter quickly became a target of

the investigation because, according to Karcinski's report, Young's attacker had said to her, "I bet you didn't know I was going to do this. I've been watching you." Young never suggested to Fairbanks that she thought Hawkins was the one who attacked her.

Fairbanks informed Susan that her husband was being investigated as a suspect in the June 26 attack. Fairbanks and Susan met or spoke on the telephone several times. During one of their first discussions, Susan told Fairbanks that Porter had a propensity for engaging in violent sex and that, at times, she feared for her physical safety. Fairbanks took no steps to corroborate Susan's allegations.

Fairbanks homed in on Porter as a potential suspect even more intently after Susan, during one of her discussions with Fairbanks, reported that

Porter had taken credit for the June 26 attack and had confessed specific details about it. According to Susan, Porter told her in mid-August that the attack at the motel was fueled by his anger at Susan for separating from him. He further stated that he broke into the motel intending to kill a woman. When he learned of Porter's statements, Fairbanks thought that the crime-related facts Porter divulged to Susan were facts that could have been known only to the attacker. Fairbanks was unaware at the time he spoke to Susan that a local newspaper had published a story containing many details of the attack shortly after June 26.

At some point during the investigation, Fairbanks entered Porter's name into a computer database of criminal offenders and discovered information about an unsolved crime in which a

white male had attempted to climb through the window of a young woman's apartment, but was chased off by the woman's screams for help. The victim of the burglary identified a nearby neighbor as the perpetrator. The neighbor's name was Michael Porter. The victim filed a police report describing the incident. Her description included the fact that a belt was found on the balcony underneath her apartment window. Recognizing the similarity between the two attacks, Fairbanks attempted unsuccessfully to locate the victim who had filed the police report. He was not able to determine whether the Michael Porter he was investigating for the LaRue Motel attack lived near the victim of the earlier crime at the time it occurred.

After a nearly three month investigation,

Fairbanks arrested Porter on September 24, 1987. In his arrest report, Fairbanks listed Porter as 6'1" in height, stated that he was born in 1960, that he weighed 170 lbs., and that he had blue eyes and black hair. This physical description was not radically different from the description Young had given Fairbanks in the hospital on the night of the attack, although it did differ substantially from the description Young gave Karcinski at the gas station and from the description of Tony Hawkins contained in Hendrickson's report.

Porter was brought to trial on August 15, 1988. Declan Mansfield prosecuted the case on behalf of the State Attorney's Office. Assistant Public Defender Stephen Dehnart represented Porter. Dehnart was not very familiar with the case, however. He had inherited it only three or

four weeks before trial after Porter's original attorney, Assistant Public Defender Michael McMillan, who had handled pretrial discovery, was forced to step aside due to a serious viral infection that resulted in a coma lasting three or four months. McMillan testified in his deposition in this case that his illness in 1988 disrupted the orderly discovery process. McMillan did not keep a list chronicling which police reports he received. McMillan does not remember receiving either the Karcinski or the Hendrickson report during the time he represented Porter. Dehnart likewise did not have either the Karcinski or the Hendrickson report during the 1988 trial. Porter was convicted. Two months later, he was sentenced to life in prison without the possibility of parole.

As the lead investigator on the case, it was

Fairbanks's obligation to ensure that all police reports prepared in connection with the investigation were turned over to the State Attorney's Office. Fairbanks acknowledged his responsibility, testifying in a deposition for this case: "Back then, I don't know what the State Attorney's Office obligation was. And that wasn't my job to know what their obligation was. But I had an obligation to furnish them with the reports, which I did. Yes, sir." While Fairbanks cannot recall what the procedure was in 1988 for forwarding police reports to the State Attorney's Office, he is confident he complied with it:

> [I]t was my responsibility to get the reports together and send them over ... and I don't recall whether I hand-carried them to the front desk at the State Attorney's Office or... whether I took [them] over [when] we

were having an invest, [3] or whether there was a box in the office. I just don't remember exactly what the procedure was. But I know I followed the procedure. I always followed the procedure, and [had] no reason not to.

Fairbanks never followed up with the State Attorney's Office to see whether the reports were actually received. Fairbanks cannot say for certain whether the reports were in Mansfield's file before or during the 1988 trial. His uncertainty notwithstanding, Fairbanks testified that the State Attorney's Office must have received the reports before the invest proceeding was held because, if Mansfield had not had copies of the "original reports of the offense" during the invest, he would

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[3] An "invest" is a meeting between the law enforcement officers handling an investigation and the prosecutor, at which time a decision is made regarding whether the State will file charges against the subject of the investigation.

have jumped all over me" and "eaten me alive." Mansfield did neither.

Mansfield has no specific recollection of either of the reports. Mansfield testified, however, that he habitually turned over to the defense all police reports he received. He testified that if the defense failed to get a particular report, it must have been because the report was never received in the State Attorney's Office. Mansfield's practice in 1987-1988 was to turn over to defense attorneys all police reports, so long as the reports were "connected to the case." According to Mansfield, the State Attorney's Office maintained no record-keeping system to track which reports were turned over to the defense in a given case and which ones were not. Mansfield testified that police reports "would be handed over at some point" by the appropriate officer, but that "I'm not quite sure how it got into

our file because it went to a secretary who would put it in a file and then you would at some point get it. It wasn't handed to you personally." Mansfield admitted, however, that police reports were, on occasion, inadvertently left out of discovery packets sent to defense counsel. In fact, when asked at his deposition whether this ever happened, Mansfield responded: "Absolutely. Absolutely."

In 1994, in connection with a federal habeas petition filed by Porter, Charles Fulgieri, an investigator with the Federal Public Defender's Office, began looking into the circumstances surrounding Porter's conviction. As part of his investigation, Fulgieri traveled to the Dade City location of the Pasco County Sheriffs Office where he was told that records from the Porter case were being stored. Fulgieri was given a packet of

documents. Included in the packet were the Fairbanks report, the Hendrickson report, the Karcinski report, and a report prepared by a crime scene technician. Shortly after receiving these documents, Fulgieri went to review the Porter file in the state public defender's office. According to Fulgieri, the state file contained no police reports at all - not even Fairbanks's report, which Porter has never alleged was withheld from the prosecution or the defense. Fulgieri tried to speak with Fairbanks about the matter, but Fairbanks refused to speak to him without the presence of an Assistant United States Attorney. Fulgieri never spoke with Karcinski, Hendrickson, or Mansfield. Denhart refused to speak with Fulgieri. McMillan, who did speak with Fulgieri, could not provide any information about the

reports.

On the basis of the information learned by Fulgieri, Porter added to his federal habeas petition an allegation that the State violated his due process rights under Brady when it failed to turn over the Karcinski and Hendrickson reports. After Porter exhausted his Brady claim in state court, the district court rejected the claim on the merits. The district court determined that the reports were favorable to Porter's defense and were suppressed by the prosecution, but that they were not "material" for Brady purposes because there was not "a reasonable probability that the result of this trial would have been different" if they had been disclosed. The district court denied Porter's habeas petition. On appeal, Porter challenged the district court's rejection of his Brady claim. We concluded

that the reports were material, reversed the district court, and granted Porter's habeas petition. On retrial, in 2002, Porter was acquitted of all charges.

In 2004, Porter filed this § 1983 action, alleging that "James Gary Fairbanks illegally and wrongfully suppressed material exculpatory evidence in violation of Plaintiffs rights under the [Fourteenth] Amendment to the United States Constitution." Compl. 11. Also, as we noted at the outset, Porter alleged two claims against Sheriff White. The district court granted summary judgment in favor of Fairbanks and White. Porter appeals.

II. STANDARD OF REVIEW

We review de novo a district court's grant of summary judgment, applying the same standards that bound the district court and viewing the

evidence and all reasonable inferences in the light most favorable to the non-moving party. See Drago v. Jenne, 453 F.3d 1301, 1305 (11th Cir. 2006). "Summary judgment is appropriate when 'there is no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law.'" Id. (quoting Fed.R.Civ.P. 56(c)).

III. DISCUSSION

The district court held that Fairbanks was entitled to qualified immunity on Porter's due process claim, concluding that Fairbanks had not violated a "clearly established" principle of constitutional law; namely, the due process principle that forbids police from intentionally withholding *Brady* material from prosecutors. Fairbanks urges us to affirm the district court's qualified-immunity determination because, as of

1988, the time at which Fairbanks is alleged to have violated Porter's Fourteenth Amendment rights, the only relevant due process principle "clearly established" by binding precedent was that police officers could not *intentionally* withhold from prosecutors material evidence favorable to the defense - conduct that Fairbanks says Porter cannot prove. See McMillian v. Johnson, 88 F.3d 1554, 1569 (11th Cir. 1996) ("Our case law clearly established [as of 1987 and 1988] that an accused's due process rights are violated when the police conceal exculpatory or impeachment evidence"). Porter, on the other hand, who reads our decision in McMillian more broadly, urges us to reverse the district court's qualified-immunity determination because, in his view, McMillian stands for the proposition that, as

of 1988, the due process clause prohibited *any* failure on the part of police officers to disclose to prosecutors material evidence favorable to the defense whether an officer acted intentionally, negligently, or blamelessly. Porter also argues that, even if his reading of McMillian is mistaken, he has produced "ample circumstantial evidence" to show that Fairbanks "more likely than not intentionally withheld the two missing reports from the prosecutor." For the reasons set forth below, we conclude that Porter's due process claim fails on the merits of the constitutional question. This conclusion, of course, moots the "clearly established" inquiry.

When confronted with a government official's invocation of qualified immunity, we have been instructed by the Supreme Court to first decide the

threshold issue-before addressing whether the particular right was "clearly established" at the time it was allegedly violated - of whether the official has deprived the plaintiff of a constitutional right at all. See Brosseau v. Haugen, 543 U.S. 194, 197, 125 S. Ct. 596, 598 (2004); Saucier v. Katz, 533 U.S. 194, 201, 121 S. Ct. 2151, 2156 (2001) ("insisting [that courts] turn[] to the existence or nonexistence of a constitutional right as the first inquiry"); Wilson v. Layne, 526 U.S. 603, 609, 119 S. Ct. 1692, 1697 (1999) ("A court evaluating a claim of qualified immunity 'must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all .... '") (citations omitted); Coma v. Gabbert, 526 U.S. 286, 290, 119 S. Ct. 1292, 1295 (1999); County of Sacramento v. Lewis, 523 U.S. 833, 841 n.5, 118 S. Ct. 1708, 1714

n.5 (1998); Siegert v. Gilley, 500 U.S. 226, 232, 111 S. Ct. 1789, 1793 (1991). We proceed to the "clearly established" prong of the qualified-immunity inquiry - the prong on which Fairbanks and Porter have focused - only "[i]f a constitutional right would have been violated under the *plaintiffs* version of the facts." Lee v. Ferraro, 284 F.3d 1188, 1194 (11th Cir. 2002); see Saucier, 533 U.S. at 201, 121 S. Ct. at 2156 ("If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity").

Given the Supreme Court's insistence that we resolve assertions of qualified immunity in this manner, we first determine the merits of Porter's claim - whether he has produced evidence from which a reasonable juror could conclude that

Fairbanks's conduct deprived him of a right guaranteed by the Due Process Clause. Our first task is to examine the right alleged to have been violated by Fairbanks. See Lewis, 523 U.S. at 841 n.5, 118 S. Ct. at 1714 n.5 ("As in any action under § 1983, the first step is to identify the exact contours of the underlying right said to have been violated"); see also Baker v. McCollan, 443 U.S. 137, 140, 99 S. Ct. 2689, 2692 (1979) ("The first inquiry in any § 1983 suit" is "to isolate the precise constitutional violation with which [the defendant] is charged").

As noted at the outset, we have already held that Porter's procedural due process right to a fair trial was violated in 1988.[4] See Porter v. Moore, No.

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[4] The right protected by the Brady rule is "the defendant's right to a fair trial mandated by the Due Process Clause of

01-12311 (11th Cir. Feb. 4, 2002) (unpublished). Specifically, we held that Porter's right under Brady to receive evidence favorable to his defense, evidence that in Porter's case had both exculpatory and impeachment value, was violated "when the prosecutor withheld favorable police reports from Porter's defense counsel." Id. at 3. We held that the

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the [Fourteenth] Amendment to the Constitution." United States v. Agurs, 427 U.S. 97, 107, 96 S. Ct. 2392, 2399 (1976); see Grayson v. King, 460 F.3d 1328. 1337 (11th Cir. 2006) ("The Brady rule is grounded in a defendant's right to a fair trial"). The right to a fair trial, in turn, stems from the procedural sphere of the Due Process Clause. See Daniels v. Williams, 474 U.S. 327, 337, 106 S. Ct. 677, 678 (1986) (The Due Process Clause of the Fourteenth Amendment contains "a guarantee of fair procedure, sometimes referred to as a procedural due process": the State may not...imprison...a defendant without giving him a fair trial")

(Stevens, J., concurring)

undisclosed reports were material for Brady purposes because Porter had "shown a reasonable probability that the result of the trial would have been different if the police reports had been produced and available." Id. at 4. Our determination that Porter's procedural due process rights were violated by the prosecution's failure to observe its Brady obligations therefore caused us to grant Porter's petition for habeas corpus and set aside his conviction.

Porter maintains in the present suit that Fairbanks caused the underlying Brady violation and that his conduct in causing that due process violation makes him properly liable for damages under § 1983.

Our discussion of Porter's claim against Fairbanks proceeds in three parts. First, we note

that it remains an open question in this Circuit whether the procedural due process violation that resulted from the prosecution's nondisclosure of Brady material is the same constitutional violation that subjects Fairbanks to civil liability under § 1983 or whether Porter's claim against Fairbanks is predicated on an independent due process violation. See Jean v. Collins, 221 F.3d 656, 659 (4th Cir. 2000) (en banc) (Wilkinson, C.J., concurring) (noting, on similar facts, that "[t]he question before us now is whether there was an *additional* constitutional violation in this case") (emphasis added). Second, we consider whether an official in Fairbanks's position, whose conduct allegedly caused a Brady violation, can be said to have caused a constitutional deprivation if his conduct is no more than merely negligent. Third,

we consider whether there is evidence in this case from which a reasonable juror could conclude that Fairbanks is liable under § 1983 for violating Porter's due process rights.

A. Porter's Claim Against Fairbanks in this § 1983 Action for Damages

In McMillian, a § 1983 action against law enforcement officials that involved allegations similar to Porter's, we stated that "§ 1983 provides a cause of action for a violation of the due process right to a fair trial that is protected by Brady." 88 F.3d at 1567 n.12. After various Brady violations caused his murder conviction and death sentence to be set aside on appeal, McMillian sued several law enforcement officials who he alleged "suppressed and withheld exculpatory and impeachment evidence in violation of [McMillian's] due process rights under the Fourteenth

Amendment" Id. at 1560. Treating the underlying Brady violation as the basis for McMillian's allegations against the law enforcement officials, the district court denied qualified immunity to three of the officials, holding that McMillian had created a genuine issue of material fact on the question of whether the officials [4] "intentionally withheld several pieces of exculpatory and impeachment evidence from the ... prosecutor." Id. at 1566. The district court further determined that a law enforcement official's intentional withholding of Brady material from a prosecutor was prohibited by clearly established due process principles at the time of the alleged withholding. Id. On the officials' interlocutory' appeal, we accepted as true McMillian's allegations of

intentional withholding [5]and, in the process of considering whether the officials violated McMillian's clearly established due process rights,

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[5] Because of the interlocutory posture of the appeal, and because the district court had concluded that McMillian adduced sufficient evidence to create a genuine issue of fact regarding whether the officials' conduct was intentional, we proceeded directly to the purely legal question presented by the "clearly established" prong of the qualified-immunity analysis. In other words, we did not have occasion to determine the appropriate level of culpability necessary to state the sort of due process claim McMillian asserted. As to McMillian's due process claim against the officials, we simply assumed that the officials acted intentionally and noted for qualified-immunity purposes that *if* the officials *intentionally* withheld what they knew to be Brady material, *then* they violated clearly established law. Our decision in McMillian, therefore, left open the question of whether less-than-intentional conduct would suffice to establish a Brady-type due process claim against law enforcement officials.

we recognized that a handful of courts had permitted Brady-type due process claims to be pursued against law enforcement officials under § 1983. Id. at 1567 n.12. We agreed and held that, under § 1983, a plaintiff may assert a due process claim for money damages against a police officer. Id. Thus, McMillian establishes Porter's right to pursue this § 1983 action for damages against Fairbanks.[6] It is unnecessary in this case to

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[6] Although the statute of limitations for § 1983 claims arising in Florida is four years, see Chappell v. Rich, 340 F.3d 1279, 1283 (11th Cir. 2003), Porter's due process claim against Fairbanks is not time-barred, because under Heck v. Humphrey, 512 U.S. 474, 489-90, 114 S. Ct. 2364, 2374 (1994), his § 1983 cause of action, seeking as it does damages to redress time spent in prison following conviction at a constitutionally deficient trial, did not accrue until we vacated his conviction in 2002. Id. ("[A] § 1983 cause of action for

determine whether Porter's claim sounds in procedural or substantive due process.[7] That is because, as discussed below, we would reach the same result using the same analysis regardless of how the claim is characterized.

B. The Level of Culpability Necessary to Subject a Law Enforcement Official to §1983 Liability for Causing a Brady Violation

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damages attributable to an unconstitutional conviction or sentence does not accrue until the conviction or sentence has been invalidated"). Porter's § 1983 suit for damages, filed in 2004, is thus timely.

[7] While the "procedural" versus "substantive" due process distinction does not affect the outcome of this case, it might, in a future case, be significant in light of Parratt v. Taylor, 451 U.S. 527, 101 S. Ct. 1908 (1981), overruled in part by Daniels,. 474 U.S. at 330-31, 106 S. Ct. at 664, and Zinermon v. Burch, 494 U.S. 113, 110 S. Ct. 975 (1990).

In the criminal or habeas context, a prosecutor's culpability is irrelevant for purposes of demonstrating a procedural due process violation based on a Brady nondisclosure.[8] That is, a

[8] Injury flowing from a procedural due process violation (i.e., incarceration following a constitutionally unfair trial) that results from a prosecutor's failure to comply with the Brady rule cannot be redressed by a civil damages action against the prosecutor under § 1983 because the prosecutor is absolutely immune from such liability. See Imbler v. Pachtman, 424 U.S. 409, 427, 430, 96 S. Ct. 984, 993, 995 (1976) (prosecutors entitled to absolute immunity from suit when engaged in "activities . . . intimately associated with the judicial phase of the criminal process," even though, in some instances, "this immunity does leave the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty"); see also Broam v. Bogan, 320 F.3d 1023, 1030 (9th Cir. 2003) (prosecutor's failure to comply with Brady rule involves "an exercise of the prosecutorial function and entitles

defendant establishes a Brady violation in the criminal or habeas context whenever he can show that favorable evidence material to his case was not disclosed to the defense, *"irrespective of the good faith or bad faith of* the prosecution." Brady, 373 U.S. at 87, 83 S. Ct. at 1197 (emphasis added); see Strickler v. Greene, 527 U.S. 263, 288, 119 S. Ct. 1936, 1952 (1999) ("[U]nder Brady an inadvertent nondisclosure has the same impact on the fairness *of* the proceedings as deliberate concealment"); Agurs, 427 U.S. at 110, 96 S. Ct. at 2401.

("If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor").

[him] to absolute immunity from a civil suit for damages"); Long v. Satz, 181 F.3d 1275, 1279 (11th Cir. 1999); Fullman v. Graddick, 739 F.2d 553, 558-59 (11th Cir. 1984).

The Brady rule thus imposes a no-fault standard of care on the prosecutor. If favorable, material evidence exclusively in the hands of the prosecution team fails to reaeh the defense - for whatever reason - and the defendant is subsequently convicted, the prosecution is charged with a Brady violation, and the defendant is entitled to a new trial. It is this no-fault standard of care that Porter says should apply to Fairbanks in this § 1983 suit for damages. While Porter alleges alternatively that Fairbanks's failure to disclose was intentional, he nevertheless argues that intent does not matter because Fairbanks may be held liable in damages regardless of his culpability. Porter Br. at 21 ("Since Brady claims do not contain a subjective component, whether Detective Fairbanks acted intentionally is irrelevant").

To support his argument that a no-fault standard of care should apply to Fairbanks in the § 1983 context, Porter reasons as follows: (1) a Brady violation is a due process deprivation; (2) Brady may be violated without regard to culpability; (3) McMillian holds that such a due process deprivation may be redressed under § 1983; (4) § 1983 contains no state-of-mind requirement independent of that necessary to violate the underlying constitutional provision; (5) Fairbanks caused the underlying Brady violation; and thus (6) under § 1983, Fairbanks may be held liable for a due process deprivation without regard to his culpability. We disagree. We reject this reasoning as inconsistent with Supreme Court precedent. We hold that the no-fault standard of care Brady imposes on prosecutors in the criminal or habeas

context has no place in a § 1983 damages action against a law enforcement official in which the plaintiff alleges a violation of due process.

Porter's argument is reduced to the following proposition: because the Supreme Court in Brady held that a due process violation occurs without regard to good or bad faith, and because Porter has asserted a Brady claim, he should not be required to show that Fairbanks acted with any level of culpability. The flaw in Porter's argument is that his claim is *not* a pure Brady claim. As our McMillian opinion pointed out, the constitutional duty described by Brady and its progeny - the duty to disclose favorable, material evidence to the defense - is imposed on the *prosecutor*. See Jean, 221 F 3d at 660 (Wilkinson, C.J., concurring) (stating that "to speak of the duty binding police

officers as a Brady duty is simply incorrect," and pointing to Supreme Court cases placing the duty upon the prosecution; Brady, 373 U.S. at 87, 83 S. Ct. at 1197; Giglio v. United States, 405 U.S. 150, 154, 92 S. Ct. 763, 766 (1972); Moore v. Illinois, 408 U.S. 786, 794, 92 S. Ct. 2562, 2568 (1972); Agurs, 427 U.S. at 108, 96 S. Ct. at 2400; United States v. Bagley, 473 U.S. 667, 675-76, 105 S. Ct. 3375, 3379-80 (1985); Kyles v. Whitley, 514 U.S. 419, 437-38, 115 S. Ct. 1555, 1567-68 (1995)). Although our binding precedent in McMillian establishes that the correlative duty on the part of law enforcement officials is to turn over exculpatory evidence to the prosecution, 88 F.3d at 1567, neither McMillian nor any other binding precedent [9] elaborates on the

[9] See Jean, 221 F.3d at 659 (Wilkinson, C.J., concurring) (discussing the case law extant as of 2000).

scope of that duty. For example, although McMillian did hold that the law was clearly established as of 1987 and 1988 that a police officer had a duty not to intentionally withhold exculpatory evidence from the prosecution, id. at 1568-69, the opinion did not address whether less-thanintentional conduct on the part of a police officer would violate the duty. See supra n.5.

Thus, it is for the alleged breach of this correlative duty - Fairbanks's duty as a law enforcement official to turn over exculpatory evidence to the prosecution - and the loss of liberty resulting therefrom, that Porter must be deemed to be seeking compensation in this case. We address as a matter of first impression whether Porter must demonstrate that Fairbanks acted with a level of culpability consisting of more than mere

negligence.[10]

Porter's allegation in this § 1983 action - that Fairbanks's failure to disclose the police reports to the prosecution caused the denial of his due process right to a fair trial - amounts to an allegation that Fairbanks committed a constitutional tort. See 42 U.S.C. § 1983 ("Every person who, [under color of state law], subjects, or causes to be subjected, any citizen of the United

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[10] In addition to showing breach and injury, Porter must, to prevail on his § 1983 claim, demonstrate that Fairbanks caused the constitutional deprivation. See Troupe v. Sarasota County, 419 F.3d 1160, 1165 (11th Cir. 2005) ("A §1983 claim requires proof of an affirmative causal connection between the defendant's acts or omissions and the alleged constitutional deprivation"); see also Monell v. Dep't of Soc. Servs., 436 U.S. 658, 692, 98 S. Ct. 2018, 2036 (1978) ("Congress did not intend § 1983 liability to attach where [] causation [i]s absent").

States... to the deprivation of any rights ... secured by the Constitution...shall be liable to the party injured"); see also Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 305-06, 106 S. Ct. 2537, 2542 (1986) (" We have repeatedly noted that 42 U.S.C. § 1983 creates a species of tort liability in favor of persons who are deprived of rights, privileges, or immunities secured to them by the Constitution") (citations and internal quotation marks omitted); City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 727, 119 S. Ct. 1624, 1647 (1999) ("There is no doubt that the cause of action created by § 1983 is, and was always regarded as, a tort claim") (Scalia, J., concurring). This is reflected in part by the nature of the relief Porter seeks in his complaint - monetary compensation sufficient to make him

whole for the years he spent in prison following his 1988 conviction. See Compl. 11 ("This is an action for damages to compensate Michael D. Porter for the fifteen years he spent in Florida jails and prisons after he was .. wrongfully convicted"); see Stachura, 477 U.S. at 306-07, 106 S. Ct. at 2542-43 ("Punitive damages aside, damages in tort cases are designed to provide *compensation* for the injury caused to plaintiff by defendant's breach of duty" and "Congress adopted this common-law system of recovery when it established liability for constitutional torts;" thus, "the basic purpose of § 1983 damages is to *compensate persons for injuries* that are caused by the deprivation of constitutional rights") (citations and internal quotation marks omitted).

Not every action by a state actor that results

in a loss of liberty under the Due Process Clause gives rise to liability under § 1983. The Supreme Court, addressing the question of "when tortious conduct by state officials rises to the level of a constitutional tort" for purposes of an alleged due process violation, held in Daniels v. Williams that "the Due Process Clause is simply not implicated by a *negligent* act of an official causing unintended loss of or injury to life, liberty, or property." 474 U.S. 327, 328, 106 S. Ct. 662, 663 (1986). In so holding, the Court in Daniels partially overruled its decision in Parratt v. Taylor, 451 U.S. 527, 101 S. Ct. 1908 (1981), to the extent that Parratt had recognized negligent conduct as sufficiently culpable to constitute a deprivation under the Due Process Clause. 474 U.S. at 330-31, 106 S. Ct. at 664. The Court reiterated that § 1983 "contains no

state-of-mind requirement independent of that necessary to state a violation of the underlying constitutional right." Id. at 330, 106 S. Ct. at 664.

Because the source of the underlying right allegedly violated in Daniels was the Due Process Clause, the Court looked to its text - "[N]or shall any State deprive any person of life, liberty, or property, without due process of law" - to determine whether that constitutional provision mandated a particular level of culpability as a prerequisite for liability. The Court noted that "the word 'deprive' in the Due Process Clause connote[s] more than a negligent act," which, the Court stated, explains why the guarantee of due process has historically "been applied to *deliberate* decisions of government officials." Id. at 330, 331, 106 S. Ct. at 664, 665 (emphasis in original).

Emphasizing the point that mere negligent conduct does not "wor[k] a deprivation in the *constitutional sense," id.* at 330, 106 S. Ct. at 664 (alteration and emphasis in original), the Court has since stated, citing Daniels, that "the Constitution does not guarantee due care on the part of state officials; liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process." Lewis, 523 U.S. at 849, 118 S. Ct. at 1718.

As noted above, we find it unnecessary in this case to determine whether Porter's claim sounds in procedural or substantive due process. This is so in part because our conclusion regarding the level of culpability necessary to sustain a due process claim seeking damages against a state official is not dependent on the characterization of

Porter's claim. In Davidson v. Cannon, a case decided on the same day as Daniels, the Court held that "the protections of the Due Process Clause, *whether procedural or substantive,* are just not triggered by lack of due care." 474 U.S. 344, 348, 106 S. Ct. 668, 671 (1986) (emphasis added); see Lewis, 523 U.S. at 849, 118 S. Ct. at 1718 (noting that Cannon "clarif[ies] that Daniels applies to substantive, as well as procedural, due process").

On the authority of Daniels and Cannon, we hold that mere negligence or inadvertence on the part of a law enforcement official in failing to turn over Brady material to the prosecution, which in turn causes a defendant to be convicted at a trial that does not meet the fairness requirements imposed by the Due Process Clause, does not amount to a "deprivation" in the constitutional

sense. Thus, a negligent act or omission cannot provide a basis for liability in a § 1983 action seeking compensation for loss of liberty occasioned by a Brady violation.[11]

C. Whether Porter Has Produced Evidence Sufficient

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[11] We conclude below that the evidence in this case would, at best, support only an inference of mere negligence on the part of Fairbanks; therefore, like the Court in Daniels, we have no reason to consider whether, in the context of a claim like Porter's, "something less than intentional conduct, such as recklessness or 'gross negligence,' is enough to trigger the protections of the Due Process Clause." Daniels, 474 U.S. at 334 n.3, 106 S. Ct. at 666 n.3. See Wilson v. Northcutt, 987 F.2d 719, 722-23 (11th Cir. 1993) (recognizing the question left open by Daniels and noting that "[b]ecause ... the appellees' conduct did not rise to the level of gross negligence, we leave for another day the determination of whether gross negligence can support a § 1983 [due process] claim").

to Show that Fairbanks's Conduct in this Case was More than Merely Negligent and that Fairbanks's Conduct Caused the Brady Violation

Having established that a due process claim like Porter's will not give rise to § 1983 liability in the absence of some evidence of more-than-negligent conduct on the part of the defendant-law enforcement official, we now consider whether Porter has produced sufficient evidence to create a triable issue of fact with regard to Fairbanks's culpability. We also consider whether Porter has shown an "affirmative causal connection" between Fairbanks's conduct and the denial of due process occasioned by the Brady violation.

1. The Karcinski Report

Regarding the Karcinski report, Porter's claim against Fairbanks fails for lack of causation. See Troupe, 419 F.3d at 1165. The causal chain relied

upon by Porter to support his due process claim with respect to the Karcinski report is this: (1) Fairbanks did not give the report to the State Attorney's Office, (2) the State Attorney's Office therefore never had the report, (3) because the State Attorney's, Office never had the report, it could not disclose it to Porter's defense, and (4) because the report was not disclosed to his defense, Porter was denied his due process right to a fair trial. A review of the record, however, conclusively demonstrates that the second link in Porter's causal chain is missing. The undisputed evidence shows that the Karcinski report was in fact in possession of the State Attorney's Office prior to Porter's trial in August 1988. Accordingly, the record makes plain that the report was turned over to the prosecution by Fairbanks or someone else, and thus any failure to disclose the report to

Porter's defense prior to trial was necessarily caused by the prosecution, not Fairbanks.

Karcinski gave testimony at a deposition in February 1988, some six months before Porter's trial. The transcript of that deposition is part of the record in this case. Four individuals were present at the deposition: (1) Karcinski, (2) Carl Johnston, an Assistant State Attorney who covered the deposition for Mansfield, (3) McMillan, the Assistant Public Defender who handled Porter's defense for a brief period of time during the discovery phase of the proceedings, and (4) a court reporter. At the time of the 1988 deposition, Karcinski was no longer employed by the Pasco County Sheriffs Office and, as a result, had not had an opportunity to review any police reports - including his own in preparation for his testimony.

The police report Karcinski prepared on the night of the attack is the only one he prepared in connection with the case. Karcinski has given undisputed deposition testimony in this case that he did not have a copy of his police report with him when he went into the 1988 deposition.

During questioning at the 1988 deposition, Karcinski had trouble remembering specific details about the information Young had given him at the gas station in the early morning hours following the attack. About halfway through the deposition, Johnston - the Assistant State Attorney - asked Karcinski: "Is that your report'?" Karcinski responded affiiuiatively: "Uh-huh." Johnston then said to McMillan: "Do you want to give him an opportunity to review it?" To which McMillan responded: "That's fine with me." The parties then

went off the record while Karcinski reviewed his report. Karcinski could not recall at his deposition in this case which of the two attorneys handed him the report; but it was one of them.

Back on the record, McMillan stated: "The ex-deputy has had a chance to review his report...." McMillan then went on to ask Karcinski if, based on his review of the report, he had anything further to add to his prior testimony regarding the information he gathered from Young. Karcinski testified that he remembered more of the details of the attack, but "[o]ther than that, I can't recall any other, you know, actual statements she had made.... [S]he was pretty much in a state of shock." Karcinski did not volunteer *any* information about the physical description' of the attacker

Young gave him at the gas station, which was included in the report. Instead, with regard to the description given by Young, Karcinski stated: "She had mentioned that it was dark, she was grabbed from behind, and that she did not get a good look at the person who, you know - ." Cutting Karcinski off, McMillan said he had no further questions, and the deposition concluded.

McMillan, at a deposition given in connection with this case, testified that he did not remember obtaining a copy of Karcinski's report before the 1988 deposition and that he did not remember reviewing the report while the deposition was underway. McMillan further testified that, if he had received or reviewed the report, he would have questioned Karcinski about the physical

description Young gave him at the gas station - a description that, again, Karcinski failed to mention during the deposition. In the summary judgment posture of this case, we assume McMillan is correct when he says that he never saw the Karcinski report. We must therefore assume that McMillan did not carry the Karcinski report into the 1988 deposition. That leaves Johnston as the only individual present who could have brought Karcinski's report to the deposition. Johnston has not given testimony in this case.

With respect to Porter's claim against Fairbanks, it is irrelevant whether or not McMillan ever saw a copy of the Karcinski report. To establish the "affirmative causal connection" between Fairbanks and the alleged constitutional violation, as required by Troupe, 419 F.3d at 1165,

Porter would have to show both that Fairbanks withheld the Karcinski report from the prosecution and that the prosecution did not obtain the report from anyone else. The focus of our inquiry, then, is on whether the prosecution received the report. The transcript of the 1988 deposition coupled with Karcinski's undisputed testimony that he did not carry the report to the deposition and our assumption that McMillan could not have done so either (because he never saw it) - makes clear that Johnston, the Assistant State Attorney, had possession of the report at the time of the deposition. Given the undisputed state of the record, it is impossible to say that any act or omission by Fairbanks caused the prosecution not to receive the Karcinski report. It is therefore impossible to say, with respect to this report, that

Fairbanks's conduct caused the Brady violation. Rather, it appears that the prosecution had possession of the report, but that somewhere along the way the report failed to reach the defense, thus giving rise to the Brady violation.

2. The Hendrickson Report

Porter argues that the following facts would permit a reasonable juror to infer that Fairbanks intentionally withheld the Hendrickson report from the prosecution:

> (1) that Detective Fairbanks had the Hendrickson . . . report[] before the Michael Porter trial in 1988; (2) that Detective Fairbanks was required by PCSO policy to turn over [that report] to the State Attorney's Office; (3) that Detective Fairbanks understood he was required by PCSO policy to turn over [that report] to the State Attorney's Office; and (4) that [the Hendrickson report] w[as] in fact never turned over to the State Attorney's Office.

Porter Br. at 25. We disagree. We have meticulously combed the record and have found no evidence - beyond the evidence as summarized in

Porter's own brief and beyond his 'conclusory allegations - to bolster Porter's assertion that Fairbanks intentionally withheld the Hendrickson report from the prosecution.

The strongest permissible inference that one might conceivably draw from these facts is that the Hendrickson report failed to reach the State Attorney's Office on account of some negligent act or omission properly attributable to Fairbanks, the official charged with the duty to deliver the police reports to the prosecution. Even that inference, however, is doubtful given how little anyone involved with the investigation and prosecution of this case can remember about the circumstances surrounding the handling of this report.[12] Even

[12] Indeed, there is considerable doubt that Fairbanks or his office was even the cause of the defense's non-use of the

Hendrickson report. The 12 fact that the Hendrickson report was not located in the public defender's file in 1994 - six years after Porter's first trial, when Fulgieri conducted his investigation in connection with Porter's federal habeas petition - is of little probative value, because the public defender's file contained *no* police reports at all, and Porter has never alleged that he did not receive for use at trial Fairbanks's report, which, incidentally, contains a description of Young's attacker at odds with the description Young gave Karcinski immediately following the attack. Assuming that the Hendrickson report never reached Porter's trial counsel, Dehnart, the possible causes are several - the report could have been misplaced in Fairbanks's office, in the prosecutor's office, or in the office of Porter's initial defense attorney, McMillan, who conducted pretrial discovery, but whose representation of Porter was interrupted three to four weeks before trial by a serious illness. Moreover, we know that another police report that the defense did not get, the Karcinski report, was in fact in the possession of the prosecutor's office at least six months before trial. There is

assuming that the Hendrickson report was misplaced by negligence in Fairbanks's office, however tenuous that assumption, there is no evidence of ill-will or motive on the part of Fairbanks. Indeed, there is absolutely no evidence from which a jury could reasonably infer intent to withhold, recklessness, or anything more than mere negligence. Because Porter is unable to show that the Hendrickson report failed to reach the

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absolutely no evidence suggesting that the misplacement of the Hendrickson report occurred in Fairbanks's office, rather than in one of the other two. Although we doubt Porter has adduced sufficient evidence on causation with respect to the Hendrickson report, we need not reach that question in light of our conclusion that, even assuming Porter could demonstrate causation, there is no evidence that Fairbanks engaged in any more-than-negligent conduct.

State Attorney's Office as a consequence of some more-than-negligent act or omission on the part of Fairbanks, we must reject his due process claim.

IV. CONCLUSION

We conclude that Porter has failed to create a genuine issue of material fact on his due process Claim against Fairbanks. Because Porter's claim against Fairbanks fails on the merits, we need not reach the second prong of the qualified-immunity analysis. See Ferraro, 284 F.3d at 1194; see also Saucier, 533 U.S. at 201, 121 S. Ct. at 2156. Our conclusion that Fairbanks did not violate Porter's due process rights means that Porter's claims against White fail. See Los Angeles v. Heller, 475 U.S. 796, 799, 106 S. Ct. 1571, 1573 (1986); see also Rooney v. Watson, 101 F.3d 1378, 1381-82 (11th Cir. 1996); Vineyard v. County of Murray, Ga., 990

F.2d 1207, 1211 (11th Cir. 1993). Accordingly, the judgment of the district court is affirmed. AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 06-11769

MICHAEL D. PORTER,

Plaintiff-

Appellant,

Versus

BOB WHITE, in his official capacity as Sheriff of Pasco County, JAMES GARY FAIRBANKS,

Defendants - Appellees.

On Appeal from the United States District Court for the Middle District of Florida

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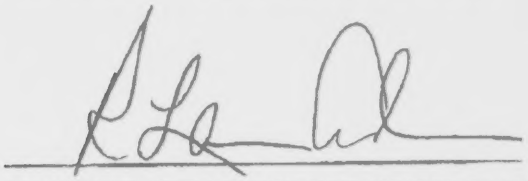
ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

Before: ANDERSON and MARCUS, Circuit Judges, and ALTONAGA,* District Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en bane (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:



UNITED STATES CIRCUIT JUDGE

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*Honorable Cecilia M. Altonaga, United States District Judge for the Southern District of Florida, sitting by designation.

UNITED STATES COURT OF APPEALS
For the Eleventh Circuit

No. 06-11769

District Court Docket
No. 04-00367-CV-T-17-MSS

MICHEAL PORTER,
Plaintiff-Appellant,

versus

BOB WHITE,
in his official capacity as
Sheriff of Pasco County,
JAMES GARY FAIRBANKS,

Defendants-Appellees.

Appeal from the United States District Court
For the Middle District of Florida

JUDGMENT

ISSUED AS MANDATE It is hereby ordered, adjudged, and decreed that the attached opinion included herein by reference, is entered as the judgment of this Court.

Entered: April 12, 2007
For the Court: Thomas K. Kahn, Clerk
Gilman, Nancy

ISSUED AS MANDATE
JUL 26 2007
U.S. COURT OF APPEALS
ATLANTA, GA

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

MICHAEL PORTER,
]
Plaintiff,

v. CASE NO. 8:04-CV-367-T-17MSS

BOB WHITE,
in his official capacity as
SHERIFF OF PASCO COUNTY, and JAMES GARY FAIRBANKS, in his official capacity as
PASCO COUNTY SHERIFF'S
DETECTIVE,

Defendants.

_____/

ORDER

This cause is before the Court on:

Dkt.	43	Motion for Summary Judgment (Fairbanks)
Dkt.	44	Motion for Summary Judgment (White)
Dkt.	48	Response
Dkt.	49	Response
Dkt.	50	Cross-Motion for Summary Judgment
Dkt.	51	Response

The Court conducted oral argument on the above motions on February 21, 2006.

This case is a complaint for damages in three counts: 1) Count I - 42 U.S.C, Sec. 1983, Suppression of Material Exculpatory Evidence, as to Defendant Fairbanks; 2) Count II - 42 U.S.C. Sec. 1983, Policy, Practice, Procedure or Custom, as to Defendant White as Pasco County Sheriff; and 3) Count III - 42 U.S.C. Sec. 1983, Failure to Train, as to Defendant White as Pasco Count Sheriff.

Case Mp/ 8:04-CV-367-T-17MSS

I. Standard of Review

This circuit clearly holds that summary judgment should only be entered when the moving party has sustained its burden of showing the absence of a genuine issue as to any material fact when all the evidence is viewed in the light most favorable to the non-moving party. Sweat v. The, Miller Brewing Co.,708 F.2d 655

(11th Cir. 1983). All doubt as to the existence of a genuine issue of material fact must be resolved against the moving party. Hayden v. First National Bank of Mt. Pleasant, 595 F.2d 994, 996-7 (5th Cir. 1979), quoting Gross v. Southern Railroad Co., 414 F.2d 292 (5th Cir. 1969). Factual disputes preclude summary judgment.

The Supreme Court of the United States held, in Celotex Corp. v. Catrett, 477 U.S. 317 (1986):

> In our view the plain language of Rule 56c mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. Id. At 273.

The Court also said, "Rule 56(e) therefore requires the nonmoving party to go beyond the pleadings, and by her own affidavits, or by the 'depositions, answers to interrogatories, and

admissions on file,' designate 'specific facts showing there is a genuine issue for trial.'" Celotex, at 274.

II. Facts

1. Michael Porter was charged with a sexual battery which took place in 1988. Defendant Fairbanks of the Pasco County Sheriff's Office was the lead detective investigating the crime.

2. Michael Porter was convicted of sexual battery in Pasco County Circuit Court on August 16, 1988.

3. On February 4, 2002, the United States Court of Appeals for the Eleventh Circuit reversed Michael Porter's conviction on the grounds that reports from the Pasco County Sheriff's Office concerning the presence of another individual, Tony Hawkins, at the crime scene constituted material

exculpatory evidence which the Due Process Clause of the Fifth Amendment to the United States Constitution required be turned over to Michael Porter's defense counsel. The Eleventh Circuit Court of Appeals found that Michael Porter had shown a reasonable probability that the result of his trial would have been different if the police reports at issue had been produced and available.

4. Michael Porter received a new trial at which his defense counsel used the additional reports of Hendricksen and Karcinski.

5. On November 16, 2002, Michael Porter was found not guilty of all charges. 6.

6. Defendant Fairbanks testified in his deposition that he turned over all reports to the Pasco County State Attorney's Office.

7. Declan Mansfield, of the Pasco County State Attorney's Office, testified that he did not have all the police reports at the time of the first trial.

8. Michael McMillan, Michael Porter's initial defense counsel, testified he did not have the reports. Michael McMillan represented Michael Porter and prepared for Michael Porter's trial, but due to a serious illness did not actually represent Michael Porter at his first trial.

9. Stephen Dehnart represented Michael Porter at the first trial, and testified he did not have all the police reports.

10. On November 13, 1987, the convictions of William Riley Jent and Earnest Lee Miller in the Pasco County Circuit Court were reversed by the United States District Court for the

Middle District of Florida in Case No. 83-849-Civ-T-13 and Case-No. 86-98-Civ-T-13 because two exculpatory reports from the Pasco County Sheriff's Office were not turned over to defendants and their defense counsel. The Pasco County Sheriff's Office was the lead investigative agency for Jent and Miller.

III. Official Capacity – Fairbanks.

The Court notes that the parties stipulated that the official capacity claim as to Defendant Fairbanks is redundant, and that claim is dismissed.

IV. Individual Capacity - Fairbanks

Defendant Fairbanks seeks entry of summary judgment in his favor. Defendant argues that Plaintiff has not established a prima facie case

based on admissible evidence, and Defendant argues that he is entitled to qualified immunity.

A. Qualified Immunity

The Court notes the following discussion of the general principles of qualified immunity in McMillian v. Johnson, 88 F.3d 1554 (11th Cir. 1996):

> "In all but exceptional case, qualified immunity protects government officials performing discretionary functions from the burdens of civil trials and from liability. (Citation omitted). Only when an official's conduct violates 'clearly established statutory rights of which a reasonable person would have known' is the official not protected by qualified immunity. (Citations omitted). To be 'clearly established,' the law that the government official allegedly violated 'must have earlier been developed in such a concrete and factually defined context to make it obvious to all reasonable government actors, in the defendant's place, that 'what he is doing' violates federal law. (Citation omitted). 'For qualified immunity to be surrendered, pre-existing law must dictate, that is, truly compel...the conclusion for every like situated, reasonable government

agent that what defendant is doing violates federal law in the circumstances. (Citation omitted). The plaintiff bears the burden of demonstrating that the defendant violated clearly established law. (Citation omitted)."

In McMillian, supra, the Eleventh Circuit Court of Appeals discusses the requirements of Brady:

> In Brady, the Supreme Court held that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. (Citation Omitted). The Supreme Court has not explicitly addressed the disclosure duties of the police and other investigators under Brady. This court has noted, however, that investigators have no duty to disclose exculpatory and impeachment evidence to the defense.
>
> Kelly v. Curtis, 21 F.3d at 1552. The Constitution imposes the duty to disclose exculpatory and impeachment evidence to the defense on the prosecutor. (Citation omitted). Investigators satisfy their obligations under Brady when they turn exculpatory and impeachment evidence over to the prosecutor. (Citation omitted). If they have reason to believe that the prosecutor already has the

> exculpatory and impeachment evidence, though, investigators have no duty to disclose the evidence. Kelly, 21 F.3d at 1552.

In McMillian, the Court also notes the finding of the Eleventh Circuit Court of Appeals that clearly established law prohibits police suppression of exculpatory and impeachment evidence. In McMillian, the Eleventh Circuit Court of Appeals reviewed a decision of the district court which held that in 1987 and 1988 a police officer had a clearly established duty under Brady to not intentionally (emphasis added) withhold exculpatory or impeachment evidence from the prosecutor. The Eleventh Circuit Court of Appeals states: "Our case law clearly established that an accused's due process rights are violated when the police conceal exculpatory or impeachment evidence. Freeman v. State of Georgia, 599 F.2d 65, 69 (5th Cir. 1979), cert. denied, 444 U.S.

1013 (1980).

The Court has examined the Freeman case, and notes the following facts in that case:

> "The appeal centers around the elusive Darlene and her failure to appeal at Freeman's state trial. Immediately after the shooting, the police got an ambiguous statement from Darlene that could be read as consistent with both the state's theory and Freeman's defense. It was subsequently recanted in part, and significantly, did not include the testimony that Hill was armed. After being held briefly as a material witness, Darlene seemed to disappear. In the course of attempting to prepare its case, the state sought to locate Darlene and even had a material witness arrest warrant for her. Agents of the district attorney could not find her at the address furnished. Sgt. Richard Fitzgerald, a city homicide detective who investigated the shooting was requested to help locate Darlene but consistently maintained he did not know of her whereabouts. At the trial, he testified under oath that he did not "know exactly" where she had been during the months preceding the trial and that although the prosecutor had asked him for an address for Darlene, he had not furnished any such address. In fact, Fitzgerald had not only located Darlene but he had become her trusted confident (sic). He had spoken with her on a monthly basis from the time of the shooting

> until the trial and had been to her apartment three weeks prior to trial. For apparently personal reasons, Fitzgerald had helped conceal Darlene in an attempt to shield the witness from some apprehended danger involving her violence prone husband or some other spurious or illogical reasons, allegedly involving politically warring factions within the Atlanta Police Department. This close relationship developed into an O. Henry ending when Darlene married Sgt. Fitzgerald one year after the trial."

In Freeman, the Fifth Circuit Court of Appeals found that Sgt. Fitzgerald's willful and intentional conduct in concealing Darlene's whereabouts amounted to state suppression of favorable evidence in violation of the Fourteenth Amendment.

In order for Defendant Fairbanks to have violated clearly established law in 1988 so as to remove the cloak of qualified immunity, the admissible evidence in this case must establish that Defendant Fairbanks intentionally withheld the police reports from the prosecution.

The Court has reviewed all the depositions.

There are factual disputes in the respective versions of what happened in 1988. Defendant Fairbanks testified that he turned over all the reports, although at present he has no specific recollection of doing so, because he followed his normal procedure. Declan Mansfield testified that he turned over all the reports that he received to the defense. Declan Mansfield does not have a specific recollection of the subject reports, and testified about his normal procedure in handling cases i.e. to turn over all reports. Declan Mansfield also testified as to the normal procedure in the State Attorney's office for receiving documents in 1988, and there are no paper records documenting receipt or transmittal of the reports. Unlike normal current office procedures, in which technology aids in and documents the flow of information, the entire process was

manual, and permeated with the risk of human error. Declan Mansfield also testified that the office was short-handed and inundated with cases at that time.

Michael McMillian, Plaintiff's initial defense counsel, also testified that he had no paper record as to which documents were provided to him by the State Attorney's office. Stephen Dehnart, Plaintiff's defense counsel at the first trial, testified that he did not have the reports, but also testified he could not recall which reports were in his file, and there was no system for tracking documents received in response to discovery.

In considering a summary judgment motion, the Court is required to merely determine the presence or absence of material factual disputes, not to weigh evidence. Clearly established law in 1988 prohibited the police from concealing

exculpatory or impeachment evidence from the prosecution. The Court reads "conceal" to mean "intentionally withhold." No witness in this case can prove definitively what happened to the reports in 1988, and all witnesses are testifying from memory impaired by the passage of time. After consideration, the Court finds that there is no evidence that Defendant Fairbanks intentionally withheld the subject reports from the prosecution.

The Court therefore finds that qualified immunity shields Defendant Fairbanks, and grants the Motion for Summary Judgment on this basis.

V. Policy, Custom, Procedure or Practice

Plaintiff complains that the Pasco County Sheriff had a policy, practice, procedure or custom which permitted employees of the Sheriff's office to suppress exculpatory materials from criminal

defendants and their counsel, that the policy caused a violation of Plaintiff's constitutional rights, and Plaintiff was damaged by the violation.

Defendant seeks summary judgment as a matter of law on the basis of insufficient evidence of the existence of any such policy.

To establish a policy of Defendant, Plaintiff must identify either: 1) an officially promulgated Sheriff's Office policy, or 2) an unofficial custom or practice of the Sheriff's Office shown through the repeated acts of a final policymaker for the office. Grech v. Clayton County, Ga., 335 F.3d 1326, 1329 (11th Cir. 2003). What is at issue in this case is whether the Defendant had a practice or "custom" of permitting employees to suppress exculpatory evidence from defense counsel. Proof of Sec. 1983 liability based on 'custom' requires Plaintiff to establish "a widespread

practice that, although not authorized by written law or express municipal policy, is so permanent and will settled as to constitute a custom or usage with the force of law." Samarco v. Neumann, 44 F.Supp.2d 1276, 1289 (S.D. Fla. 1999). The existence of a widespread practice would be sufficient to demonstrate deliberate indifference to the constitutional rights of the accused.

The Jent and Miller cases establish only one incident of suppression of exculpatory evidence; both cases relate to the same crime. One incident of suppression does not establish a widespread practice of suppression of evidence, and therefore the Court cannot find that there is a triable issue as to the existence of an unofficial custom suppression of evidence and deliberate indifference to the constitutional rights of the accused. As to the reversal of Plaintiff's conviction based on a Brady violation, the Court finds that there is

insufficient evidence to show that any policy of the Pasco County Sheriff's Office caused the Brady violation. After consideration, the Court grants the Motion for Summary Judgment as a matter of law in favor of Defendant as to this issue.

VI. Failure to Train

In Count III of the Complaint, Plaintiff complains that Defendant Pasco County Sheriff failed to adequately train Defendant Fairbanks as to his constitutional obligation not to suppress exculpatory evidence. Plaintiff has contended that the failure to train was an official policy of Defendant Pasco County Sheriff's Office, and the failure to train caused Defendant Fairbanks to violate Plaintiff's constitutional rights. Plaintiff further complains that Defendant Pasco County Sheriff was deliberately indifferent to Plaintiff's right to receive material

exculpatory evidence.

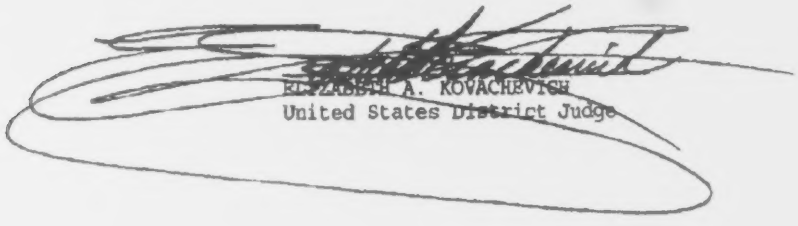
There is no evidence which establishes a widespread pattern of suppression of evidence by the Pasco County Sheriff's Office. After examining the record evidence, the Court finds that there is absolutely no evidence that there was an official policy of failure to train, that there is no evidence of an actual failure to train, or that the failure to train caused a violation of Plaintiff's constitutional rights. There is no evidence of deliberate indifference to the constitutional rights of the accused.

After consideration, the Court grants the Motion for Summary Judgment in favor of defendant as to

this issue. Accordingly, it is

ORDERED that the Motions for Summary Judgment are **granted** in favor of Defendants; Plaintiff's Cross-Motion for Summary Judgment is denied. The Clerk of Court shall enter judgment for Defendants.

DONE and ORDERED in Chambers, in Tampa, Florida on this 10th day of March, 2006.



[DO NOT PUBLISH]

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 01-112311
Non-Argument Calendar

MICHAEL D. PORTER,

Petitioner-Appellant,

versus

MICHAEL W. MOORE,

Respondent-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

(February 4, 2002)

Before TJOFLAT, BIRCH, and GODBOLD, Circuit Judges.

PER CURIAM:

The district court denied habeas corpus relief to Michael D. Porter who is under concurrent life-without-parole sentences for sexual battery and other related offenses. Porter appeals his denial of habeas corpus relief. We reverse.

Porter argues two issues. First, an alleged *Brady* violation. Second, ineffective assistance of counsel.

We review de novo an alleged *Brady* violation. *See United States v. Schlei*, 122 F.3d 944, 989 (11th Cir.1997).

In determining whether the government denied Porter substantive due process we apply the well-established *Brady* rule. *See Brady v. Maryland*, 373 U.S. 83 (1963). "There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either

because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). Therefore, to prove a *Brady* violation, a party must show: "(1) suppression by the prosecution (2) of exculpatory evidence (3) material to the issues at trial or sentencing." *Kennedy v. Herring*, 54 F.3d 678, 682 (11th Cir.1995). "Included in the materiality prong of Brady analysis is a requirement that the petitioner make a showing of actual prejudice." *Johnson v. Alabama*, 256 F.3d 1156, 1189 (11th Cir.2001) (*citing Kennedy*, 54 F.3d at 682). To show prejudice, the petitioner must "convince us that there is a reasonable probability that the result of the trial would have been

different if the [allegedly suppressed items] had been disclosed to the defense. In other words, the question is whether the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *High v. Head*, 209 F.3.d 1257, 1267 (11th Cir.2000) (internal quotations and citations omitted).

The district court held that the state violated the first two prongs of *Brady* when the prosecutor withheld favorable police reports from Porter's defense counsel. Appellee does not contend that this was error. However, the court held that Porter did not establish that prejudice resulted.

In *Sellers v. Estelle*, the defendant was convicted of murdering a police officer. 651 F.2d

1074, 1075 (5th Cir.1981).[1] The court found a *Brady* violation because the suppressed police "reports were favorable to the petitioner with respect to the determination of his guilt." Id. at 1077. The reports were exculpatory for two reasons. One, they indicated that another individual, Santos Cantera, was at the scene of the crime. See Id. Two, they said that Cantera admitted to others that he was the one who shot the officer. See Id. Hence, the reports were material. See Id.

In this case the police reports identified the perpetrator as a man between 38 and 40 years old, height between 5'7" and 5'9," dark hair, weighs 150

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[1] The Eleventh Circuit adopted as binding precedent all Fifth Circuit decisions handed down prior to the close of business on September 30, 1981. *See Bonner v. City of Richard,* 661 F.2d 1206, 1209 (11th Cir.1981)(en banc).

pounds, and having a slight southern accent. A withheld report indicates Tony Hawkins was interviewed by police at the scene of the crime. He was described as being 42 years old, 5'9" tall, weighing 160 pounds. The report also stated that Hawkins smoked Marlboro cigarettes.

At trial Porter contended that the victim could not reliably identify the perpetrator. He says that this argument was prejudicially weakened because he did not have the reports. Porter contends that if he had the reports he could have shown that: (1) the victim gave inconsistent identifications of the perpetrator throughout the investigation; (2) the description in the police reports do not match him because he is 6 feet tall, weighs 170 pounds, has black hair and has a heavy southern drawl; (3) Hawkins fits the description in

the police reports; (4) a Marlboro cigarette butt was found at the crime scene. Finally Porter submits that not having the reports was especially prejudicial because, as the district court stated, "he was convicted largely on the testimony of the victim who recognized Petitioner as the perpetrator."

We conclude that Porter has shown a reasonable probability that the result of the trial would have been different if the police reports had been produced and available. It would have been available as the basis for cross-examination of the victim whose identification of the perpetrator Porter says was inconsistent and inquiry into the circumstances of the presence at the scene of Hawkins who Porter says matched the description of the perpetrator in the report.

Withholding of Brady material in a trial that carries a life sentence is highly disturbing especially when it relates to the reliability of the only eye-witness who identified the defendant. Our government can do better than this. REVERSED.